No. 17318

In the United States Court of Appeals for the Ninth Circuit

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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CITATIONS

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 19-30) are not reported.

JURISDICTION

This petition for review (R. 32-33) involves federal income taxes for the taxable year 1953. On January 9, 1958, the Commissioner of Internal Revenue mailed to the taxpayers a notice of deficiency in the sum of $28,404.13. (R. 9-13.) Within ninety days thereafter and on February 5, 1958, the taxpayers filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272(a) of the Internal Revenue Code of 1939. (R. 5-9.) The decision of the Tax Court was entered December 27, 1960. (R. 31.) The case is brought to this Court by a petition for review filed January 19, 1961. (R. 32-33.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court erred in finding as a fact that the $40,000 profit realized by taxpayers on the sale of property to their family corporation three weeks after they had purchased it is taxable as ordinary income in the form of a disguised dividend, instead of as a short term gain on the sale of a capital asset.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> Sec. 115. Distributions by Corporations.
>
> (a) *Definition of Dividend.*—The term "dividend" * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings and profits of the taxable year * * *
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> * * * *
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> (26 U.S.C. 1952 ed., Sec. 115.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

* * * *

(2) [as amended by Sec. 150(a)(1), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 322(c)(2), Revenue Act of 1951, c. 521, 65 Stat. 452] *Short-term capital gain.*—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income;

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The facts, as found by the Tax Court (R. 20-26), some of which were stipulated (R. 15-18), may be summarized as follows:

Taxpayers, Joe and Lillian Goldstein, are husband and wife living in Los Angeles, California. In 1925, when only seventeen years old, Joe Goldstein, the oldest of five brothers—the others being Max, Edward, Bernard, and Albert—started a retail grocery business as a sole proprietorship. As his marketing business expanded, Joe employed his brothers and in this way gave them their start in his business. On or before September 27, 1945, this business became a limited partnership with Joe as the sole general partner, and Edward and Joe, as trustee for Max, as limited partners. (R. 20.)

On September 27, 1945, the limited partnership leased a parcel of land located on the corner of a major intersection in San Gabriel, California, from Torley Land Company for a term of fifty years beginning November 1, 1945. Joe had previously attempted to buy the land but had been unable to agree on the terms with J. B. Torley, majority stockholder in Torley Land Company. The lease provided for a rental of $40,000 payable in installments of $800 per year. The lease allowed the lessee to assign the lease, but unless the written consent of the lessor was secured, the lessee would not be released or discharged from any obligations thereafter accruing. (R. 20-21.)

On January 1, 1946, this lease, along with all the other assets of the limited partnership was assigned or transferred to a California corporation, The Boys' Market, Inc., in exchange for its capital stock. The Boys' Market, Inc. had been incorporated in 1936 but had remained inactive until this transfer. When notified of the assignment of the lease, the lessor's attorney advised that the partnership was not released from its obligations under the lease. (R. 20, 21-22.)

Thereafter from time to time, Joe tried to purchase the fee in this land for the business. The minutes of a meeting of the board of directors of the corporation held on January 27, 1953, state that the president (Joe) reported that it might be possible to purchase the land on which the corporation had built the San Gabriel market (sometime in 1947 or 1948 the corporation had constructed on the leased premises a market building which it subsequently used as one of its eight retail stores). According to Joe Goldstein, the purchase would enable the corporation to secure a loan on the property and thus increase its working capital. The president and secretary were thereupon authorized to "make such purchase, if the price was satisfactory, and to arrange a loan on terms and conditions they deemed proper considering our loan agreement." (R. 22.) The loan agreement just referred to had been negotiated in 1950 by the corporation with Provident Mutual Life Insurance Company of Philadelphia. Under its terms the corporation borrowed $400,000 secured by a mortgage on all of its real estate and fixed property including the company office and the store in San Gabriel. The note agreement and mortgage contained certain restrictive covenants (R. 296) which, among other things, imposed some limitations on the corporation's borrowing and divided activities (R. 22, 25-26).

During the taxable year in question, 1953, the corporation had issued and outstanding 5,500 shares of capital stock, which were held as follows (R. 24):

Name	Number of shares
Joe Goldstein	2,720
Joe and Lillian Goldstein as joint tenants	150
Lillian Goldstein as trustee for minor children	36
Edward Goldstein (brother of Joe)	1,294
Max Goldstein (brother of Joe)	1,271
Dorothy Goldstein (wife of Bernard Goldstein, brother of Joe) as trustee for her minor children	24
Everett Eddy	5
Total	5,500

The officers of the corporation were (R. 24):

Joe Goldstein	President
Edward Goldstein	Vice President
Albert Goldstein	Vice President
Max Goldstein	Vice President
Everett Eddy	Secretary-treasurer
Bernard Goldstein	Assistant secretary-treasurer

The directors of the corporation were (R. 24):

Joe Goldstein	Edward Goldstein
Lillian Goldstein	Albert Goldstein
Max Goldstein	Bernard Goldstein

Everett Eddy

The five brothers worked in various supervisory capacities in the business, with Joe as the principal executive officer and general manager. (R. 25.) He was the dominant figure in the corporation; he had control of its policies and made the executive and administrative decisions. The other stockholders and directors owed their livelihoods to him. (R. 28-29.) The brothers received salaries from the corporation and bonuses when profits justified them. During the year 1953 and on December 31, 1953, the corporation had accumulated earnings and profits and available cash in excess of $75,000 and maintained a "triple A" rating with Dun & Bradstreet. Nevertheless, it did not pay regular dividends, and although it had net earnings for 1953, the corporation did not formally declare and pay a dividend that year. (R. 25.)

Max, Edward, and Bernard obtained their stock in the company by investing their bonuses in the business from time to time. Albert, the youngest brother, never owned any stock. Everett Eddy, first employed as bookkeeper for the business in 1936, acquired his shares of stock by gift from Max. He kept the company's books and records and prepared minutes of the formal meetings of the directors, though when the brothers discussed matters together informally, minutes of such meetings were not always recorded. (R. 25.)

On April 28, 1953, at a meeting of the board held about four months after the meeting of January 27, 1953, mentioned above, the prior discussion about the possibility of purchasing the San Gabriel property was mentioned and the board then decided "that Joe Goldstein and Lillian Goldstein would buy this land as their private property, and they may at some time in the future, sell it to The Boy's [sic] Market." (R. 22.) Torley Land Company had refused to accept cash for the San Gabriel property but insisted upon an exchange for land and an apartment house in Las Vegas, worth $35,000. For various reasons discussed *infra*, the corporation declined to accept the exchange but, as indicated above, deferred to taxpayers and permitted them to negotiate with Torley Land Company in their own behalf.

As a result of further negotiations with Torley Land Company sometime before June 22, 1953, Joe entered into an agreement with Torley whereby taxpayers would buy a lot in Las Vegas, Nevada, where Torley's president lived, and build an apartment house thereon for a total cost to taxpayer of $35,000, and upon completion of the construction taxpayers would trade the Las Vegas property to Torley for the

San Gabriel property with no cash involved. Escrows to carry out this agreement were executed on June 22, 1953, and Joe and Lillian put up $35,000 of their own money to carry it out. The transaction was completed on December 8, 1953, on which date Joe and Lillian conveyed the Las Vegas property to Torley Land Company, and received in exchange a deed for the fee to the San Gabriel property, subject to the lease held by the corporation. The transaction was worked out this way at the request of Torley Land Company which had a tax basis of a little over $10,000 in the San Gabriel property. (R. 23.)

On December 31, 1953, Joe and Lillian conveyed the San Gabriel real estate to The Boys' Market, Inc., by quitclaim deed, for the sum of $75,000 in cash, thus receiving $40,000 in excess of the cost to them of the property. There were no minutes recorded in the corporation's minute book which showed a consideration of or authorization for the consummation of this transaction by the board of directors of the corporation.

The taxpayers recognized the $40,000 profit as short-term capital gain which they offset against an unused capital loss carryover. (Ex. 1.) The Commissioner, however, determined that the profit was a disguised dividend to be treated as ordinary income and therefore assessed a deficiency of $28,404.13. (R. 9-13.) On the basis of the evidence presented to it, the Tax Court found as a fact that of the $75,000 received by taxpayers, only $35,000 was paid as consideration for the property; the remaining

$40,000 was a dividend. (R. 26.) The taxpayers then petitioned for review of the Tax Court decision. (R. 32-33.)

SUMMARY OF ARGUMENT

The Tax Court concluded that on the basis of the evidence the corporation paid only $35,000 as consideration for the San Gabriel property; the remaining $40,000 was a disguised dividend distribution. Excessive payments for property to controlling shareholders have consistently been treated as dividends by the courts; and this has been true even if the transaction was neither void nor voidable under state law, because the incidence of federal transaction does not depend on the form utilized to transfer legal title in property. Whether in any one case such a payment is a dividend is a question of fact, the decision as to which is to be upheld unless clearly erroneous. It is submitted that the evidence in this case supports the finding that the other profit realized was a dividend.

Joe Goldstein was the dominant figure in the business who as president and chairman of the board exercised general supervision over the business and coordinated its activities. It was he who initiated and executed the various business deals and profit ventures. His control and his having a large unused capital loss carryover encourage the conclusion that he arranged the transaction to siphon off corporate earnings under the guise of receiving a short term gain.

The total absence of any business purpose strengthens this conclusion. The corporation's subsequent sale and leaseback of the property obliterated the only reason advanced for the corporation purchasing the property in the first place. Moreover, one of taxpayers' own witnesses testified that it was contrary to the Corporation's policy to own real estate, a statement Joe Goldstein himself never adequately explained.

The corporation's extremely favorable long-term lease on the property at a rental of only $800 per year and its purchase from its majority shareholders for more than twice the amount the most reliable evidence shows was the fair market value removes all doubt as to the purpose and nature of the transaction. Taxpayers paid $35,000 for the property. Cost, particularly when that cost is incurred only three weeks before, following negotiations with an acknowledged skillful trader is persuasive evidence of fair market value, especially when the seller (Torley Land Company) declares that because of an unfavorable lease it was impossible to get more than $40,000 for the property and that $35,000—the actual selling price—was reasonable.

Thus taxpayers sold property to their family corporation at a price greatly in excess of both what they paid for it and of the fair market value at a time when the corporation had ample earned surplus to distribute. To secure an untaxed distribution of this earned surplus, taxpayers utilized a two-step transaction, with the first phase the securing by taxpayers of the property at the price ($35,000), the corporation would have paid, and with the second phase the sale to their controlled corporation at an excessive price ($75,000), the excess representing a disguised dividend distribution.

The fact that taxpayers retained the property for only twenty-three days before selling it to their family corporation shows they regarded its purchase as a mere stepping stone, a fact Joe Goldstein in effect admitted. Furthermore, the reasons advanced by taxpayers as to why they, rather than their corporation, purchased from Torley Land Company are implausible and inconsistent with each other. The fears of violating the loan agreement with Provident Mutual or becoming involved in interstate commerce were too speculative and unlikely and the brothers' personal dislike of Las Vegas because of financial reverses suffered there too inconclusive to be persuasive that as a business matter of dollars and cents the corporation would prefer to spend over twice as much for the property by purchasing it from a California resident.

No one factor determines that the payment was in reality a dividend; instead all factors must be considered. Moreover, as the Tax Court properly recognized, the fact that the transaction was tax-motivated, not arm's length, and unusual, only warranted that it be subjected to a careful scrutiny. The evidence which this careful scrutiny revealed amply supported the Tax Court's conclusion that the corporation paid to taxpayers $40,000 as a dividend in disguise.

ARGUMENT

The Tax Court Did Not Err When It Found That The Profit Of $40,000 Realized By Taxpayers On The Sale Of Property To Their Controlled Corporation Was A Disguised Dividend And That Only $35,000 Of The Total $75,000 Purchase Price Paid By The Corporation Was Consideration For The Property

The question confronting the Court in this case is whether the Tax Court's action was clearly erroneous when it found that the $40,000 profit realized by taxpayers on the sale of property to their family corporation only three weeks after they had purchased it was in reality a disguised dividend taxable as ordinary income. The taxpayers urge that it is and insist that the profit was a short term capital gain, a gain they offset in their income tax return against a capital carry-over. In support of their position, taxpayers claim that under California law their sale of the property to the corporation was neither void nor voidable (R. 9-13). While it is true that state law is determinative of the nature of the interests created by the sale, federal law controls the manner and extent to which these interests will be taxed. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 49; *Morgan* v. *Commissioner*, 309 U.S. 78; *In re Sweet's Estate*, 234 F. 2d 401 (C.A. 10th), certiorari denied, 352 U.S. 878; *Pitts* v. *Hamrick*, 228 F. 2d 486 (C.A. 4th). For this reason, although the sale to the corporation may be perfectly valid under California law,[1] nevertheless, the

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[1] Though the taxpayers' brief implies the contrary, the Tax Court did not state or find that the sale was void or

incidence of taxation is determined by the Tax Court's finding on the basis of all the evidence presented to it that of the $75,000 received by taxpayers for the property, only $35,000 was paid as consideration while the remaining $40,000 represented a distribution of corporate earnings. (R. 26.)

Whether payment by a corporation is consideration for property, compensation, rent, loan, gift, etc., or in reality a dividend is a question of fact. *Clark* v. *Commissioner*, 266 F. 2d 698 (C.A. 9th); *Lengsfield* v. *Commissioner*, 241 F. 2d 508 (C.A. 5th); *Heil Beauty Supplies* v. *Commissioner*, 199 F. 2d 193 (C.A. 8th). Though the finding is necessarily based on inferences drawn from basic facts, nevertheless it too is to be upheld unless clearly erroneous. *Commissioner* v. *Duberstein*, 363 U.S. 278; *Weyl-Zuckerman & Co.* v. *Commissioner*, 232 F. 2d 214 (C.A. 9th). The issue itself is not a new one to this or other courts which have subjected transactions between shareholders and their close corporations to careful scrutiny: *Magnus* v. *Commissioner*, 259 F. 2d 893, 903 (C.A. 3d); *Crabtree* v. *Commissioner*, 221 F. 2d 804 (C.A. 2d), affirming *per curiam*, 22 T.C. 61; *Levine* v. *Commissioner*, 24 T.C. 147 (excessive price paid by corporation to shareholder for property taxed as dividend); *Utter-McKinley Mortuaries* v. *Commissioner*, 225 F. 2d 870 (C.A. 9th) and *Limericks, Inc.* v. *Commissioner*, 165 F. 2d 483 (C.A. 5th) (corporation denied deduction for excessive rent); *Clark* v. *Commissioner*, *supra* (tax-

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voidable under California law, and its decision in no way depends on such a finding.

payer charged with receiving dividend, not loan); *Perel & Lowenstein, Inc.* v. *Commissioner*, 237 F. 2d 908 (C.A. 6th) (corporation denied deduction for excessive compensation); Cf. *Byers* v. *Commissioner*, 199 F. 2d 273 (C.A. 8th), certiorari denied 345 U.S. 907.

No one factor is decisive in determining whether the corporate payment was actually a disguised distribution of corporate earnings. Instead the trier of fact must consider and weigh all the different factors involved in the transaction before reaching its conclusion. This is what the Tax Court did in the instant case, and as this court has ruled in other similar cases, its finding of fact will be upheld unless clearly erroneous or unless such finding is adduced from an erroneous view of the law. *Clark* v. *Commissioner, supra*; *Utter-McKinley Mortuaries* v. *Commissioner, supra*. The evidence in this case supports fully the conclusion that only $35,000 was received by taxpayers as consideration for the property and that the excess $40,000 paid by taxpayers' corporation to taxpayers was a disguised dividend. And, in arriving at such an ultimate finding the lower court applied the law as enunciated by the Congress and as layed down by this and other appellate courts.

The testimony made it clear and the Tax Court found (R. 28-29) that Joe Goldstein was the dominant figure in the corporation. As president and chief executive, he exercised general supervision over the business as a whole, coordinating its activities and overlooking the performances of his brothers. (R. 68, 152, 162, 207.) It was Joe who had begun the business as a sole proprietorship in 1925 (R. 60-61) and who was the sole general partner when the San Gabriel property was first leased (R. 16, 64). It was his idea to incorporate and cease operations of the limited partnership. (R. 209.) At the time of the transaction in question, he, together with his wife, owned a majority of the shares of stock of the corporation. (R. 17.) It was Joe's idea to lease the San Gabriel property in the first place (R. 209) and he bore the brunt of the negotiations, with some assistance from Eddy (R. 158). He later negotiated with J. B. Torley the purchase of the property for the corporation prior to his purchasing the property for himself. While his two brothers who testified displayed almost total ignorance both of the terms of the lease on the San Gabriel property and the pros and cons with respect to the corporation's purchase of it (R. 122-124, 146-148), Joe, on the other hand, revealed a firm grasp of the essentials.

Based on this control and his having a large unused capital loss carryover, it is not difficult to conclude that he arranged the transaction under examination of siphon off earnings under the pretense of receiving a short-term capital gain.[2] The lack of any formal appraisal prior to the corporation's purchase, the lack of any record in the minutes of the corporate books of either Eddy's investigation of San Gabriel's fair market value or the meeting authoriz-

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[2] However, consideration of the additional tax advantage is not necessary to the result reached by the lower court, which found sufficient facts to establish a corporate payment which was essentially equivalent to a dividend.

ing purchase, all support the Tax Court's conclusion that the others in the corporation, who "owed their livelihoods to Joe and [who] would have agreed that the corporation do anything legitimate that Joe suggested" (R. 29), readily acquiesced in the plan he developed to secure himself a tax-free dividend.

The absence of any sound business purpose to the corporation's purchase for $75,000 further points up taxpayer's control and makes his scheme even more blatant. At the time of the purchase in December, 1953, the corporation had over forty-two years remaining on an extremely favorable lease on the property under the terms of which they paid the insignificant sum of $800 rental per year. (R. 20, 21.) Both taxpayer's expert appraiser and a large stockholder in Torley Land Company, Ray E. Torley, agreed that Boys' Market, Inc., was in a very favorable position as lessee. (R. 103, 279.) Nevertheless, though over the next forty-two years the corporation would pay less than $34,000 in rent, it decided to purchase the fee for $75,000. Equally revealing and at the same time confusing is the testimony of Everett Eddy that it was contrary to the corporation's policy to own real estate (R. 54) and that subsequently the corporation entered into a sale-lease-back arrangement with respect to this property (R. 58). If the corporation purchased the property to increase its loaning capacity, it is difficult to understand how it could even contemplate a sale-lease-back arrangement.

Not only did the corporation purchase property on which it had a very long and very favorable lease, but it also paid an exhorbitant price to its controlling shareholders, not only to Torley Land Company, and it did this only twenty-three days after taxpayers had themselves purchased the property for $35,000. Confronted with this set of circumstances and the following testimony: Ray E. Torley that it is "impossible" to sell for $40,000 property subject to a 50-year lease with an $800 rental (R. 279); Everett Eddy that the price—not more than $40,000 (R. 278-279), which Torley Land Company was asking for the San Gabriel property—was too high (R. 49); and Joe Goldstein that he could not even consider retaining a $35,000 piece of property which returned only $800 per year as rental income (R. 251), the Tax Court was more than justified in finding that the corporation paid to taxpayers only $35,000 as consideration for the property (R. 26).

Taxpayers insist that they received from the corporation only the fair market value of the property. As support they point to the testimony of the independent appraiser who valued the property at $79,600 (R. 95) and Eddy's testimony that he received the figure of $75,000 from the Bank of America (R. 59). Taxpayers have neglected to explain that no evidence indicates that either of these valuations explicitly took into consideration the effect of the lease. The Bank of America's appraisal was mere hearsay and taxpayer's expert at the trial admitted that because of the terms of the 50-year lease the lessee was in a very favorable position. (R. 103.)

Fair market value has most frequently been defined as that price which a willing buyer would give to a willing seller after negotiations in which neither party was acting under compulsion. *Commissioner* v. *Marshman*, 279 F. 2d 27, 28 (C.A. 6th); *In re Williams' Estate*, 256 F. 2d 217, 218 (C.A. 9th); *Fitts' Estate* v. *Commissioner*, 237 F. 2d 729, 731 (C.A. 8th). Opinion evidence of the type presented by taxpayers is not binding. *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 627; *In re Williams' Estate*, *supra*, p. 219. Cost, however, is often considered persuasive evidence of fair market value (*Guggenheim* v. *Rasquin*, 312 U.S. 254; *Duke* v. *Commissioner*, 200 F. 2d 82 (C.A. 2d), certiorari denied, 345 U.S. 906), and this should be especially true in this case in which only three weeks before the sale in question taxpayers purchased the property from a party with an adverse economic interest, Torley Land Company, after negotiations in which neither was acting under compulsion. Furthermore, on the basis of J. B. Torley's experience in dealing with real estate and Joe Goldstein's acknowledgment that Torley was a skilled negotiator ("horse trader") (R. 214, 222) it is unlikely that Joe Goldstein secured an unfair advantage. Torley Land Company was reluctantly obliged to recognize that because of the unfavorable lease, the land could not be sold for $40,000 and $35,000 was a reasonable price. (R. 278.)

Not only therefore did taxpayers sell property to their family corporation for a price greatly in excess of what they paid for it only three weeks before, but they also sold it at a price greatly in excess of what the most persuasive evidence shows was the fair market value. In view of the subsequent sale and lease back, the only reasonably possible purpose for the purchase and sale to the corporation was the desire to secure a tax-free dividend. To gain this tax-free dividend, taxpayers resorted to a step transaction, with the first phase their securing the property at the price ($35,000) the corporation would have paid and with the second phase the sale to the controlled corporation at an excessive price ($75,000), the excess representing a disguised dividend distribution. Cf. *Commissioner* v. *Court Holding Co.*, 324 U.S. 311.[3]

After all, taxpayers sold the property only twenty-three days after they bought it. This alone is strong evidence that they considered their purchase only as a stepping stone. Moreover, the various reasons advanced by the taxpayers as to why the corporation declined to purchase the San Gabriel property directly from Torley Land Company were understandably brushed aside by the Tax Court as "inconsistent with each other and implausible". (R. 28.)

In light of taxpayers' willingness to stipulate that at all times The Boys' Markets had sufficient earned surplus to have paid for whatever they did in cash

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[3] At page 334, the Supreme Court explains "The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains for a sale of property are not finally to be determined solely by the means employed to transfer legal title."

(R. 242), it is not clear or persuasive why or how Everett Eddy feared a violation of the restrictive covenant in the corporation's loan agreement with Provident Mutual (R. 296). In what way the purchase of land in Las Vegas would involve the corporation in interstate commerce and affect its wages and hours policies was also never explained, and furthermore no evidence was offered that the corporation had ever sought legal advice. (R. 237.) Moreover, Eddy stated that ownership of real estate was contrary to the policy of the corporation (R. 54-55) whereas taxpayer Joe Goldstein claimed that it was advantageous for the corporation to own a ground fee and when confronted with the contradiction never adequately resolved it. (R. 252).

Taxpayer's brothers purportedly opposed purchase of property in Las Vegas because of financial reverses and embarrassment suffered there (R. 110, 142) but they never claimed to have lost as much as $40,000, the extra price their corporation paid by purchasing from taxpayers instead of from Torley Land Company. Joe's desire to rid himself and his estate, should he die, of the partnership's liability to Torley Land Company by purchasing the fee (R. 224, 229) did not require that he, instead of the corporation, purchase the land. Finally, Joe in fact admitted that his purchase of the property was only a stepping stone to the later sale to his corporation when he ridiculed the idea of his retaining "a $35,000 piece of property with a $800 per year return, which happens to be approximately two and three-quarters percent return." (R. 251.)

It therefore is not surprising that the Tax Court discounted the reasons offered by taxpayers as to why they, rather than their corporation, purchased from Torley Land Company, and thus ignored the form utilized by taxpayers to effectuate their purpose of securing the tax-free dividend.[4]

Taxpayers both in the Tax Court and here have relied extensively on *Sun Properties* v. *United States*, 220 F. 2d 171 (C.A. 5th) (Br. 13-19), which they urge, holds that a sale need not be disregarded because tax-motivated, not an arm's length transaction, and not done in the usual way. The issue in that case was whether a purported sale of property by a controlling shareholder to his corporation was in reality a contribution to capital. It is indeed true that in *Sun Properties* the court refused to disregard the form of a transaction only because the transaction was tax-motivated, not arm's length, and not done in the usual way, but it is also true that after listing the factors which tend to prove that a transaction is a contribution to capital and examining the evidence, the court concluded at page 175, "we do not

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[4] The Tax Court, however, did not, as taxpayers imply (Br. 11-12), hold that the taxpayers bought the property as agents of the corporation. It is true, though, that in light of the facts that Joe Goldstein tried to buy the land for the corporation, negotiated its lease, then again tried to buy the land, and that the minutes of a board meeting read, "It has now been decided that Joe and Lillian Goldstein would buy this land as their private property, and they may at some time in the future, sell it to the Boys' Market" (R. 22), such a finding would have been supported by substantial evidence.

find a particle of proof that it was in fact a contribution to capital nor that it was intended as such".

The instant case, however, is very different and taxpayer's reliance on *Sun Properties* is therefore misplaced. The Tax Court did not rule adversely to taxpayers because the transaction was tax-motivated, not arm's length, and not done in the usual way. It only explained that because of these factors, the transaction warranted a careful scrutiny (R. 26), as was also pointed out in *Sun Properties*, pp. 173-174, and, having subjected the transaction to careful scrutiny, found that the excess price received by taxpayers over what they paid for the property was a disguised dividend, a finding amply supported by the evidence. The inconsistency and implausibility of the reasons offered as to why the corporation did not purchase the land directly from Torley Land Company, taxpayer's ownership of a majority of the corporation's stock, Joe's control and domination over the corporation, the existence of a large earned surplus and absence of a formally declared dividend for 1953, the taxpayers having a very large unused capital-loss carryover, the very favorable lease held by the corporation on the land, the subsequent sale and leaseback by the corporation, and finally the exhorbitant price received by taxpayers all support the Tax Court's findings and conclusions.

This Court has ruled that a corporation may grant a dividend which is neither proportionately distributed among the shareholders nor formally declared. *Clark* v. *Commissioner*, 266 F. 2d 698. This is what the Tax Court found happened in this case: taxpayers received as a result of a plan they developed, a plan which was actually not even subtle, a disguised dividend which is taxable as ordinary income.

CONCLUSION

For the reasons given, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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